In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1919

ROBERT LEE WILLIS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-6934

WILLIAM WESLEY HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Both petitioners contend that they were prejudiced by remarks in government counsel's closing argument. Petitioner Willis contends that certain FBI notes should have been made available to him. Petitioner Harris contends that certain of the trial court's instructions were erroneous.

Following a jury trial in the United States District Court for the District of Kansas, petitioners and two others were convicted of armed robbery of a federally

insured bank, in violation of 18 U.S.C. 2, 2113(a) and (d). Both were sentenced to terms of eighteen years' imprisonment. Because an arrangement between the prosecution and a witness had not been revealed, the court of appeals reversed and remanded for a new trial. *United States* v. *Harris*, 462 F. 2d 1033 (C.A. 10). At the second trial petitioners were again found guilty and received the same sentence. The court of appeals affirmed (494 F. 2d 1273, Pet. App. A1-A4).

The indictment charged seven co-defendants [1] with the armed robbery of the Tower State Bank of Kansas City, Kansas, on November 9, 1970. Thomas Colvin and Kenneth Lewis, Jr., the two co-defendants who entered the bank and took $15,732 at gunpoint, pleaded guilty prior to trial and testified for the government. Herbert Fagan, who was serving a prison sentence for another offense at the time of petitioners' second trial and was not charged in the indictment, also testified in considerable detail about the planning and execution of the robbery. The evidence, in a light most favorable to the government, showed that petitioners planned the robbery, which was carried out by Colvin and Lewis. After Colvin and Lewis robbed the bank they abandoned their getaway car at a prearranged rendezvous with Misses Odom and Monroe, jumped into the trunk of the women's rented car and were driven to the place where the proceeds of the robbery were divided and distributed by petitioners and Colvin.

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[1] Thomas J. Colvin, Jr., William W. Harris, Kenneth L. Lewis, Jr., Rosalind E. Monroe, Marcella P. Odom, Robert Lee Willis and Kenneth L. Gordon.

1. Petitioners contend that they were prejudiced by certain statements of government counsel in closing argument.

(a) Government counsel stated:

> The defense also asserts that this Court as well as other United States District Courts, condones, encourages and wants perjury from the people who, say, it is conducting a pre-sentence for and also the United States Board of Parole wants and encourages perjury [Tr. 1183-1184].

As the court of appeals held, this was a fair response to the numerous allegations by defense counsel that the key government witnesses were lying.[2] See *United States* v. *Bursten*, 453 F. 2d 605, 611 (C.A. 5), certiorari denied, 409 U.S. 843. The objections pressed now to this and one similar remark by government counsel are not persuasive.

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[2]Some examples: "Well, this man is a scoundrel and a pathological liar. * * * He would say anything to get out of prison by his own testimony" (Tr. 1117, Attorney Bachofer commenting on Fagan). "He is a piece of garbage. He can't be believed * * * except that he wants to get out of prison, * * * literally, not figuratively * * * " (Tr. 1120, Attorney Bachofer commenting on Colvin). "Now, I'm not saying Mr. Kelly came to him or Mr. Martin came to him and said, 'Herbie, we want you to lie for us.' I'm not saying that. But they probably came to him and said, 'Listen, you told us you want to help us. Do you want to really help us? Come on and testify.' Now they didn't bother to ask him whether or not this was a true statement and you know he hasn't been charged yet, so they don't really care. They just want some more people in here. They got to build their case. Why did they do that? They felt the case was weak, at least against Marcella. They had to get that little final bit. You know, they had to try to bury her, bury her, put her away, because that's the way they think. Well, listen, they have got a job to do; you can't hold that against them" (Tr. 1147-1148, Attorney Lerner commenting on Fagan).

(b) Subsequently, government counsel stated:

> Well, Mr. Fagan, I submit, knows that Harris and Willis are at the top of the organization and they are the ones responsible and for that reason he has talked about them and the organization, meaning them all [Tr. 1187].

Counsel objected that there had been no evidence presented as to the existence of an organization; the court concurred and sustained the objection (Tr. 1187).

The prosecutor's use of the term "organization" was not outside the bounds of propriety. The weight of the evidence against petitioners and the delineation of the key roles they played in a well-organized crime was overwhelming. Petitioners planned the robbery, organizing and supervising seven other individuals in an elaborate operation.[3] Planning for the robbery included selection of an escape route, finding out how many police cars were in the area and whether there was a security guard in the bank, obtaining two getaway cars (one stolen and one rented), deciding who would go in the bank, who would drive, how many guns were needed, if a mask would be used, and arranging for a change of clothes. Viewed in the context of the evidence presented at trial, the remark concerning "the organization" was more likely to be interpreted by the jury as a reference to the planning and execution of the robbery than to any "mafia" or underworld connections, as petitioners contend. Cf. *Donnelly* v. *DeChristoforo*, No. 72-1570, decided May 13, 1974.

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[3]For example, petitioners instructed Fagan and an associate, Horace Humphreys, to pick up Colvin in Kansas City, Missouri, and bring him to Kansas for the robbery (Tr. 289-290); Fagan communicated the results of "checking out" the bank robbery site to petitioners, who double-checked the area, decided they liked it, and told Fagan (Tr. 295) and his associate they would get in touch with them at a later date to help commit the crime (Tr. 297-298).

In any event, the trial court carefully instructed the jury, on several occasions, that the statements and arguments of counsel were not evidence (Tr. 1087, 1179, 1184, 1217). Moreover, the objection to this particular remark was sustained. Under such circumstances petitioners' contention that the jury was improperly influenced by the statement is insubstantial. See, *e.g.*, ***Bailey*** v. ***United States,*** 410 F. 2d 1209, 1214 (C.A. 10), certiorari denied *sub nom.* ***Freeman*** v. ***United States,*** 396 U.S. 933.

(c) Although co-defendant Lewis, one of the two bank robbers who pleaded guilty, had been able to identify petitioners and their co-defendants at the first trial, he refused to do so at the second trial stating: "Well, the reason I can't positively identify these people at this particular time is because it has been awhile after this thing has happened and if I positively identified these people now, I wouldn't feel within myself that I am rightfully sure" (Tr. 651). Government counsel then offered the transcript of the earlier hearing in evidence as to the identification of the individuals. However, the court ruled this was unnecessary because the witness had already acknowledged that he had identified the four defendants at the previous hearing.[4] Government counsel then asked for a stipu-

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[4]Tr. 597-598:

[Mr. Hamill] Q. You remember that earlier hearing, then?
[Lewis] A. Vaguely.
Q. And were you asked to identify them at that earlier hearing?

* * * * *

A. Yes, I believe I did.

* * * * *

lation by defense counsel; the court interjected that it would take judicial notice of the earlier identification.[5] Since the circumstances surrounding the witness' earlier identification were fully explored by defense counsel (Tr. 597-599, 649-665), petitioners' rights were fully protected.

Petitioner Willis' contention that government counsel's statement in closing argument, "[a]nd as to Mr. Lewis, well, he probably helped himself as much as he could by refusing to identify the defendants. We are not mad at him. We won't be out to get him" (Tr. 1199), was prejudicial is without merit. This comment was a reasonable inference that could be drawn, and the court scrupulously instructed the jury many times that counsel's comments were merely argument.

2. Petitioner Willis contends (Pet. 14) that he was entitled to letters FBI Agent Martin wrote to government witness Fagan, and to any notes concerning those letters. Evidence at trial revealed that Agent Martin, who assisted in the investigation of the robbery but was subsequently transferred to the FBI office in Chicago, engaged in personal correspondence with Fagan beginning in mid-July 1972 (Tr. 532). Martin testified about the personal relationship between himself and Fagan which pre-

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[Mr. Joyce]	Q. Did you identify them at that time because someone had pointed them out to you and you got your information as to who they were that way or did you actually remember them?
The Witness:	A. At that present time, it was familiar to me.

[5]Although Lewis did not identify petitioners at the second trial, he described the events of the robbery and the involvement of the individuals known to him as Bob Willis, William Harris, Marcella Odom, Rosalind Monroe, Tom Colvin and Kenneth Gordon (Tr. 638-639).

cipitated the correspondence (Tr. 534-544, 552-553). Martin did not make copies of his letters to Fagan, which he regarded as personal (Tr. 544); he did retain the letters to him from Fagan. During cross-examination of Fagan the government attorney voluntarily turned over to defense counsel the letters from Fagan to Martin (Tr. 385).

There is no evidence that any notes concerning the letters were made by Agent Martin. Even had notes been made they would not have been discoverable under 18 U.S.C. 3500 or Fed. R. Crim. P. 16. The Jencks Act, 18 U.S.C. 3500, protects government files from unwarranted disclosure while requiring the government, after a witness has testified, to make available statements of the witness which it has in its possession. Assuming Fagan's letters to the agent are "statements" for Jencks Act purposes, any notes made by Martin concerning the correspondence were at most personal reactions. They were not "statements" under Section 3500 because the witness neither signed nor otherwise "adopted or approved" them.[6] 18 U.S.C. 3500(e); see *United States* v. *Turner*, 442 F. 2d 1146 (C.A. 8). See also *United States* v. *Roberts*, 455 F. 2d 930 (C.A. 5), certiorari denied, 405 U.S. 1050.

Petitioner Willis does not argue that the notes, had they existed, would have been helpful to the defense; consequently no issue of a duty to disclose under *Brady* v. *Maryland*, 373 U.S. 83, is presented.

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[6]Nor does Rule 16 provide for the recovery of such notes which, even characterized most favorably to petitioner Willis, are the "work product" of Agent Martin. Rule 16 contains a specific exclusion for statements protected from disclosure by the Jencks Act.

3. Petitioner Harris alleges that he was prejudiced by the "refusal" of the trial court to grant his request for an instruction that the identification made by a government witness may be unreliable.[7] The following colloquy took place between petitioner's counsel and the court:

> THE COURT: Mr. Bachofer, do you have any objections to the instructions or any additional requested instructions?
>
> MR. BACHOFER: *Well, Your Honor, I don't have any objection.* I just happened to think and I don't have one prepared and perhaps we should have one on identification.
>
> THE COURT: Well, there has not been one submitted and I think it is adequately covered by the Court's instructions so your request will be denied. [Tr. 1221; emphasis supplied.]

Having failed either to proffer an instruction or to object specifically to the instructions given by the court, petitioner cannot now raise the issue.[8] Fed. R. Crim. P. 30; *United States* v. *Wheeler*, 444 F. 2d 385, 388 (C.A. 10).

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[7]The identification in question, placing petitioner in the vicinity of the Tower State Bank on the date of the robbery, was made by Elroy Stuerke, who was deceased at the time of his trial. A transcript of his testimony from the previous trial was introduced into evidence (Tr. 229-251). The circumstances surrounding this positive identification (Tr. 237) were fully explored on cross-examination at the first trial.

[8]Nor was there "plain error". The instruction given was adequate and the cases relied upon by petitioner are inapposite. *Salley* v. *United States*, 353 F. 2d 897 (C.A.D.C.), involved a sale of narcotics to an undercover agent. The court held it was error to fail to instruct on the defendant's theory of defense, mistaken identity, where the possibility of erroneous identification was obvious. In *Macklin* v. *United States*, 409 F. 2d 174 (C.A. D.C.), the court held

4. Petitioner Harris' contention that the trial court erred in overruling an objection to instruction No. 28 is frivolous. The trial court gave a correct and adequate instruction on "reasonable doubt" (Tr. 1204-1205). The argument that subsequent instruction No. 28, which told the jury to use "good sense" in considering the evidence, somehow confused or modified the instruction on reasonable doubt is baseless. Petitioner's rights have been amply protected.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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that the trial court should, in cases where identification is a major issue, *sua sponte* give an identification instruction. Although we believe the essential safeguard is the exposure of identification testimony to rigorous cross-examination, it is nevertheless clear that identification was not a major issue in the instant case. The critical testimony was that proffered by petitioners' accomplices.

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